



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

JUN 1 0 2005

**FIRST CLASS MAIL**

Lyn Utrecht, Esq.  
Ryan, Phillips, Utrecht & Mackinnon  
1133 Connecticut Avenue, NW  
Washington, DC 20036

RE: MUR 5440 (formerly MUR 5626)  
New Democratic Network – Non-Federal  
Account, now known as NDN Political Fund

Dear Ms. Utrecht:

On December 17, 2004, the Federal Election Commission notified your client, New Democratic Network – Non-Federal Account, now known as NDN Political Fund, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (“the Act”). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, the Commission, on June 2, 2005, found that there is reason to believe that New Democratic Network – Non-Federal Account, now known as NDN Political Fund, violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a), provisions of the Act, and merged the investigation of this matter with MUR 5440. The Factual and Legal Analysis, which formed a basis for the Commission’s finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission’s investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission’s consideration of this matter. Please submit such materials to the General Counsel’s Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. Please refer to MUR 5440, rather than MUR 5626, in all future correspondence.

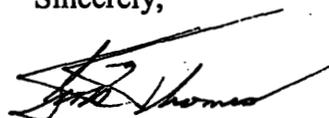
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Julie McConnell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas  
Chairman

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: New Democrat Network

MUR: 5440 (formerly MUR 5626)

**I. INTRODUCTION**

This matter involves allegations that New Democrat Network – Non-Federal Account, now known as NDN Political Fund (“NDN 527”), an entity organized under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal Election Campaign Act of 1971, as amended (“the Act”). Specifically, the complaint alleges that NDN 527 is a federal political committee that has failed to report its contributions and expenditures to the Commission and to comply with the Act’s contribution limits and source prohibitions. *See* 2 U.S.C. §§ 434, 441a(a)(1)(C) and 441b(a). In its response, NDN 527 asserts that it is a *bona fide* membership organization with a separate segregated fund, rather than a political committee, because it has not made expenditures meeting the statutory threshold for political committee status and its major purpose is not nominating or electing candidates to federal office.

NDN 527 is also a Respondent in MUR 5440. In that matter, the Commission found reason to believe, *inter alia*, that NDN 527 and its separate segregated fund, New Democrat Network – PAC (“NDN PAC”) were operating as a single political committee with federal and non-federal accounts and had violated the Act by failing to use federal funds to pay for certain advertisements. The Subpoena and Order issued to NDN 527 and NDN PAC in MUR 5440 requested information about the organization’s structure, public communications and fundraising solicitations; the investigation in that matter is ongoing. Given the overlap in information needed to resolve both potential theories of liability, adding political committee status as an alternative to the allocation theory does not add substantially to the resources necessary to

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resolve the pending matter or significantly increase the burden on Respondents. For this reason, and the fact that information available at this time regarding NDN 527's activities indicates that at least one of its main goals is to influence federal elections, there is reason to investigate whether the activities of NDN 527 triggered political committee status.

Accordingly, there is reason to believe that NDN 527 violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a). The Commission merges this matter into MUR 5440 to continue the investigation on alternative theories.

## II. FACTUAL AND LEGAL ANALYSIS

### A. FACTS

NDN 527 is registered with the Internal Revenue Service as a 527 organization. It represents itself as a membership organization with a separate segregated fund, NDN PAC.<sup>1</sup>

NDN 527's IRS registration states that its purpose is "To communicate with the public on issues

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<sup>1</sup> New Democrat Network ("NDN") formed in 1996 as a political committee with federal and nonfederal accounts, registering the federal account with the Commission and the nonfederal account, which was then called New Democrat Network, with the IRS as a 527 organization. Under this structure, NDN was a Respondent in MUR 5121, which involved allegations of affiliation between NDN and various campaign committees. *See generally* MUR 5121, First General Counsel's Report at n.13, 26 (recommending no reason to believe on affiliation and RTB/NFA on disclaimer violations). It is also the subject of an ongoing audit of its 2002 cycle activity.

On February 5, 2003, NDN reorganized as a membership organization with a separate segregated fund, NDN PAC, which it registered with the Commission. *See* MUR 5626, Response at 1; MUR 5440, Declaration of Simon Rosenberg at 1. NDN 527, the former nonfederal account, is the connected organization of NDN PAC and remains registered with the IRS under the same tax identification number. NDN 527 has attempted several times to terminate its former federal account, but was unable to do so during the pendency of the previous enforcement matter, which concluded on November 18, 2003; termination of this account remains unavailable because of the ongoing audit. Although the former federal account remains registered with the Commission, it disclosed no receipts, disbursements or cash-on-hand for the 2004 cycle.

NDN 527 formally changed its name from New Democrat Network to New Democrat Network – Non-Federal Account on January 31, 2005, and to NDN Political Fund on April 14, 2005. The IRS registration for NDN Political Fund states that it is "connected" to NDN but does not specify that the connected entity is NDN PAC. *See* NDN Political Fund, Form 8871, Notice of 527 Status at 2 (Apr. 14, 2005). This name change coincides with a modification to NDN's website, which now states that NDN is a membership organization that operates through two affiliates, NDN Political Fund and NDN PAC, suggesting that the organization recently created a third entity under the NDN umbrella. *See* About NDN, at <http://www.newdem.org/about> (last visited May 3, 2005). Because these changes occurred recently, the investigation in MUR 5440 has not yet resolved issues regarding NDN's structure and operation.

that relate to the election of candidates for federal, state or local office or the legislative process in a manner that does not expressly advocate the election or defeat of a particular candidate.”<sup>2</sup>

During the 2004 election cycle, the website shared by NDN PAC and NDN 527 stated that the mission of the organization was to elect “public servants at all levels of government who believe that the Democratic Party needs to find ways to lead our country into a new era while holding true to our most cherished values.”<sup>3</sup> Currently, NDN 527’s website states,

NDN is a national membership organization which fights each day to restore the promise of America, promotes strategies to modernize progressive politics and invests in a new generation of emerging leaders. NDN and its community works with other allied groups to build a strong, vibrant and powerful progressive politics capable of meeting the challenges of the 21st century.<sup>4</sup>

In furtherance of its goal to invest in emerging leaders, NDN 527 endorses state and local candidates, while NDN PAC, a multicandidate committee, endorses and makes direct contributions to federal candidates.<sup>5</sup>

Beginning in early 2003, NDN 527 launched its Hispanic Project, an advertising campaign directed at Hispanic Americans that included more than twenty commercials on Spanish-language television, radio and Internet-based media.<sup>6</sup> In connection with this project, NDN 527 aired advertisements directed to Spanish-speaking voters in Florida, Nevada, Colorado, New Mexico and Arizona during the 2004 election cycle, and expanded its advertising

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<sup>2</sup> NDN, Form 8871, Notice of 527 Status (amended Jan. 1, 2005).

<sup>3</sup> See generally MUR 5440, Factual and Legal Analysis.

<sup>4</sup> About NDN, at <http://www.ndn.org/about> (last visited May 3, 2005).

<sup>5</sup> See MUR 5626, Response at 9; see also NDN List, at [http://www.ndnpac.org/new\\_leaders/ndn\\_list.html](http://www.ndnpac.org/new_leaders/ndn_list.html) (last visited May 3, 2005).

<sup>6</sup> See Hispanic Project, at <http://www.ndn.org/hispanicproject> (last visited May 3, 2005).

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campaign to Ohio, Pennsylvania, Wisconsin, and Michigan in the last six weeks of the cycle.<sup>7</sup>

While many of the advertisements did not reference a federal candidate, but rather contained generic pro-Democrat language, several others criticized President Bush. For example, one television advertisement, criticizing President Bush's lack of funding for higher education for minorities, featured a girl asking, in Spanish, "President Bush, why did you break your promise?" Another Spanish-language advertisement, entitled "Nombre," criticizes President Bush and cautions viewers to "Beware of the name Bush. Be careful, Iraq is a failure."

During the 2004 cycle, NDN 527 also ran a media campaign entitled "Restoring the Promise of America."<sup>8</sup> This advertising campaign included television advertisements aired in Alaska, Colorado, and Oklahoma that were tailored to each state and criticized Republican handling of the economy. The complaint asserts that NDN 527's website stated the following at the time the advertisements aired:

NDN has dramatically escalated its national "Restoring the Promise" campaign, adding a compelling new set of television ads in Alaska, Colorado and Oklahoma and a new national effort to engage millions of citizens on the Internet.... This new effort builds on NDN's \$6 million Spanish-language campaign that has been running ads *in five battleground states* for months. To date, NDN has run television ads in *seven battleground states* this year—Alaska, Arizona, Colorado, Florida, New Mexico, Nevada and Oklahoma.<sup>9</sup>

According to its current website, polls conducted by NDN 527 to test the effectiveness of its "Restoring the Promise" advertisements concluded that viewing the ads made undecided voters more favorably disposed toward the Democratic Party, more unfavorably disposed to the

<sup>7</sup> See *id.*; see also NDN, 2003 Form 990, Return of Organization Exempt from Income Tax (Nov. 12, 2004) (stating that the purpose of the Hispanic Project is "encouraging the Hispanic population of the United States to vote Democrat").

<sup>8</sup> See Restoring America's Promise, at <http://www.ndn.org/promise> (last visited May 3, 2005).

<sup>9</sup> See MUR 5626, Complaint at 4-5 (emphasis added).

Republican Party, more likely to vote Democratic, and less likely to vote Republican. Also, these advertisements purportedly served to counter advertisements aired by conservative groups, including Americans for Job Security, Club for Growth, and the Chamber of Commerce, and helped “ensure that a positive message about the Democratic agenda was heard, and that the agendas of the two parties were accurately compared.”<sup>10</sup>

Finally, NDN 527 operates the New Majority Coalition Project, a multi-year research program designed “to help identify the characteristics and concerns of America’s changing electorate; effectively communicate a Democratic message to them; develop a potent critique of President Bush and the GOP; and devise a strategy that energizes our party’s base and attracts swing voters in order to build a lasting Democratic coalition.”<sup>11</sup> With the goal of “building a new progressive majority,” beginning in August 2002, NDN 527 drafted memos proposing a policy agenda for Democratic candidates, and funded polls of likely voters, many of which focused on undecided voters and measured voters’ perceptions of Pres. Bush.<sup>12</sup> A June 10, 2004 polling memo entitled, “2004 Research Shows Good News for Democrats,” for example, examined the favorable/unfavorable ratings of the Democratic and Republican parties, studied how various categories of voters – several of which it identified as “Def[inite] Kerry,” “Def[inite] Bush,” “Swing,” and “Battleground” – rated various issues, and explored the impact of Ralph Nader’s candidacy on Senator John Kerry’s poll ratings.<sup>13</sup>

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<sup>10</sup> See *id.*

<sup>11</sup> See New Majority Coalition, at <http://www.ndn.org/newmajoritycoalition> (last visited May 3, 2005).

<sup>12</sup> See, e.g., NDN Strategy Memorandum, available at [http://www.ndn.org/newmajoritycoalition/nmc\\_strategy.html](http://www.ndn.org/newmajoritycoalition/nmc_strategy.html) (Sept. 15, 2004) (poll conducted by Mark Penn about voters’ perceptions of President Bush and Senator John Kerry and the relative strengths of the Republican and Democratic Parties on various issues).

<sup>13</sup> See Memorandum from Simon Rosenberg *et al.*, NDN–MUR 5440 000039-48 (included as an Internet link in a January 2005 membership renewal notice produced as NDN–MUR 5440 000024-27).

**B. ANALYSIS**

The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. *See* 2 U.S.C. § 431(4)(A).<sup>14</sup> For the purpose of triggering political committee status, the Act defines the terms “contributions” and “expenditures” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” *See* 2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i); *see also* *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2nd Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

As a Section 527 organization, NDN 527 is by law “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1). The “exempt function” of 527 organizations is the “function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization,” or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

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<sup>14</sup> To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986).

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As discussed above, NDN 527 is a Respondent in MUR 5440. Although more information is needed, information currently available indicates that NDN 527's major purpose may be federal campaign activity. For example, during the 2004 election cycle, several of NDN 527's advertisements attacked or opposed President Bush. In addition, as discussed above, NDN 527 targeted battleground states with its generic advertising campaigns. Moreover, polls conducted by NDN 527 analyzed the television-viewing habits and voting patterns of "swing" or "toss up" voters, examined voters' perceptions of President Bush and Senator John Kerry, and tested how various issues and messages polled with different categories of voters, all with the stated goals of "develop[ing] a potent critique of President Bush and the GOP" and "devis[ing] a strategy that energizes our party's base and attracts swing voters in order to build a lasting Democratic coalition."<sup>15</sup> Because NDN 527 also participated in state and local campaign activity as well as generic party building, however, the conclusion that federal campaign activity is its major purpose requires further investigation.

In MUR 5440, NDN 527 produced DVDs containing television and Internet advertisements, which it represented as all of its public communications. While many of NDN 527's advertisements contained generic pro-Democrat language, several attacked or opposed President Bush.<sup>16</sup> On the contributions side, NDN 527 has produced a representative sample of its fundraising solicitations and membership renewal letters. Although these solicitations contain generic electoral language, none refers to a specific federal candidate or election.<sup>17</sup> NDN 527,

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<sup>15</sup> See, e.g., *The Door Is Open*, available at <http://www.ndn.org/assets/pdf/thedoorisopen.pdf> (Aug. 7, 2003).

<sup>16</sup> See *supra* p. 4.

<sup>17</sup> See, e.g., NDN NDN-MUR 5440 000035 ("It is the strength of our members that allows us to create our successful media campaigns, advocate for our powerful agenda, support the best candidates in the toughest races across the country and launch efforts to meet the conservative challenge by building a new progressive infrastructure.").

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however, has not yet produced its members-only newsletters, which have been requested in MUR 5440.

In light of the incomplete and ongoing investigation into NDN 527's campaign activities in MUR 5440, which involves the same evidence and has theories that are closely related to those in the instant matter, the Commission has decided to add political committee status as an alternative to the allocation theory in MUR 5440.

**III. CONCLUSION**

Accordingly, there is reason to believe that NDN 527 violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a). The Commission merges this matter into MUR 5440 to continue the investigation on alternative theories.

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